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**2003 Wis Eth Bd 09**  
**LOCAL CODE -- DISQUALIFICATION**

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The Ethics Board advises that a special purpose district reconsider its vote because a commissioner who voted to distribute a large monetary refund to original members of the district would be a recipient of that sum. In any new vote on the same proposal, the commissioner who would receive the distribution should abstain from any participation in discussion, debate, or vote.

Facts

- ¶1 This opinion is based upon these understandings:
- a. You are the attorney for a special purpose district.
  - b. Twenty years ago, when the district was created, each member of the district was assessed a set member fee.
  - c. In 2000, member charges were reduced significantly and user fees were also substantially reduced.
  - d. The district has a large surplus of money.
  - e. The district's commissioners have voted to give this money to original members of the district who still are members of the district. There are fewer than one-half of the original individuals still members of the district.
  - f. There are currently several hundred landowners in the district.
  - g. One of the commissioners who voted for the distribution is an original member of the district and will receive a large distribution.
  - h. The district has not yet paid out any money.

Questions

- ¶2 The Ethics Board understands your questions to be:

Would it be improper for the district commissioner who is scheduled to receive a large distribution refund to accept that money?

Discussion

¶3 In our view, the commissioner who is scheduled to receive the large distribution should not have participated in the decision.

¶4 Section 19.59(1)(a) and (c)2., reduced to their elements, provide:

No local public official  
May use his or her office  
To obtain anything of substantial value or benefit  
For the official or an organization with which the official is associated.<sup>1</sup>

¶5 Section 19.59(1)(c)1, reduced to its elements, provides:

No local public official  
May take any official action  
Substantially affecting a matter  
In which the official or an organization with which the official is  
associated  
Has a substantial financial interest.<sup>2</sup>

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<sup>1</sup> Section 19.59(1)(a), *Wisconsin Statutes*, provides:

**19.59 (1)(a)** No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. A violation of this paragraph includes the acceptance of free or discounted admissions to a professional baseball or football game by a member of the district board of a local professional baseball park district created under subch. III of ch. 229 or a local professional football stadium district created under subch. IV of ch. 229. This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by ch. 11.

Section 19.59(1)(c)2., *Wisconsin Statutes*, provides:

**19.59(1)(c)** Except as otherwise provided in par. (d), no local public official may:  
2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

<sup>2</sup> Section 19.59(1)(c)1., *Wisconsin Statutes*, provides:

**19.59(1)(c)** Except as otherwise provided in par. (d), no local public official may:  
1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.

¶6 A commissioner of a special purpose district is a local public official.<sup>3</sup> Participating in official debate, discussions, or votes is a use of office and official action.<sup>4</sup> A large distribution refund is something of substantial value and is a private benefit.<sup>5</sup>

¶7 In prior opinions, the Ethics Board has said that, even if a local official has a substantial financial interest in a legislative or quasi-legislative matter, the official may still participate in the matter's consideration, as long as:

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<sup>3</sup> Section 19.42(7u), *Wisconsin Statutes*, provides:

**19.42(7u)** "Local governmental unit" means a political subdivision of this state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision or special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing.

Section 19.42(7w)(a), *Wisconsin Statutes*, provides:

**19.42(7w)** "Local public office" means any of the following offices, except an office specified in sub. (13):

(a) An elective office of a local governmental unit.

\* \* \*

(c) An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

\* \* \*

(d) An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor.

You have indicated that the commissioners are elected.

<sup>4</sup> 1999 Wis Eth Bd 3, ¶5; 1997 Wis Eth Bd 1, ¶4; 1995 Wis Eth Bd 6, ¶4; 1995 Wis Eth Bd 3, ¶4.

<sup>5</sup> "Substantial value" is contrasted with mere token or inconsequential value. 2002 Wis Eth Bd 07, ¶4 (a contract that pays close to \$6,000 is something of substantial value); 1997 Wis Eth Bd 2, ¶4; 1995 Wis Eth Bd 5, ¶6; 1993 Wis Eth Bd 8, ¶6; 7 Op. Eth. Bd. 1 (1983); 5 Op. Eth. Bd. 97 (1982). 1995 Wis Eth Bd 3, ¶9 (legislator should not vote to retain his or her salaried position on the governing board of a governmental entity); 1995 Wis Eth Bd 1, ¶6 (an agency official should not participate in a rulemaking proceeding that allocates business opportunities, if the official would receive an allocation, even if the official would be no better off under an allocation system than under the current unregulated approach).

- A. The official's action affects a whole class of similarly-situated interests;
- B. The official's interest is insignificant when compared to all affected interests in the class; and
- C. The official's action's effect on the official's private interests is neither significantly greater nor less than upon other members of the class.<sup>6</sup>

¶8 The Ethics Board developed this test in recognition that the law favors an official's exercise of the official's public duties. The Board has applied the test only with respect to legislative or quasi-legislative issues; that is, to matters of broad policy. It does not, and should not apply in the context of a quasi-judicial decision such as determining who should receive a contract or, as in this case, a grant of money.<sup>7</sup>

¶9 Even if a decision to distribute surplus monies could be characterized as a broad matter of policy, application of the test would not permit the commissioner to vote to give money to the remaining original members of the district because the class of people eligible to receive a distribution of money from the district would appear to be, at the least, all members of the district who were assessed the original fee. Not all members of that class are being treated equally.

¶10 Because the commissioner who is scheduled to receive the large distribution participated in that decision, we believe the decision may be overturned under common law principals.<sup>8</sup> The best course of action would be for the commission to reconsider its vote. In any new vote on the same proposal, the commissioner who would receive the distribution should abstain from participation in any discussion, debate, or vote.

¶11 This advice is consonant with common law principles that a member of a public body is disqualified to vote on propositions in which he or she has a direct pecuniary interest.<sup>9</sup>

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<sup>6</sup> 1992 Wis Eth Bd 22, ¶6; 11 Op. Eth. Bd. 9, 10 (1989).

<sup>7</sup> 2002 Wis Eth Bd 01, ¶10; 1996 Wis Eth Bd 10 (city council member who, as retired city employee participates in city health insurance plan, should not participate in consideration of terms or award of health insurance contracts).

<sup>8</sup> See *Heffernen v. City of Green Bay*, 266 Wis. 534 (1954); *Edward E. Gillen Co. v. City of Milwaukee*, 183 N.W. 679 (1921); *Ballenger v. Door county*, 131 Wis.2d 422 (Ct. App. 1986).

<sup>9</sup> *The Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208 (1879). As the Attorney General has said:

Advice

¶12 The Ethics Board advises that the district commission reconsider its vote. In any new vote on the same proposal, the commissioner who would receive the distribution should abstain from any participation in discussion, debate, or vote.

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A pecuniary interest sufficient to disqualify exists . . . where it is one which is personal or private to the member, not such interest as he has in common with all other citizens or owners of property, nor such as arises out of the power of the [government] to tax his property in a lawful manner.

36 Op. Att'y Gen. 45 (1947). *See also* 1999 Wis Eth Bd 03, ¶9; 1997 Wis Eth Bd 1; 1995 Wis Eth Bd 3; 67 C.J.S. Officers §204.